(3)

No. 97-1802

In The Supreme Court of the United States

October Term, 1997

DAVID CONN and CAROL NAJERA, *Petitioners,*

vs.

PAUL L. GABBERT, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S COUNTER "QUESTIONS PRESENTED FOR REVIEW"

Respondent has chosen not to reply to the Question Presented in the Petition for Writ of Certiorari, and instead has offered three entirely different "Questions Presented For Review". Although couched as questions, these are in fact the respondent's arguments as to why the Petition for Certiorari should be denied. To those three questions, the petitioners reply as follows:

1. Granting certiorari to review this *published* opinion will in no way result in piecemeal appellate review. In fact, this is the only opportunity petitioners, or this Court, will have to review the Ninth Circuit's opinion, regardless of what happens to the rest of the case in the District Court.

2. The Ninth Circuit's decision does not reflect the simple application of "well-settled issues of law". Rather, the Court of Appeals created an entirely new cause of action, which impermissibly expands the right to practice a profession well beyond the limits defined by a long line of this Court's decisions.

3. The conclusions of law reached in the opinion below are *not* fact-specific, but rather constitute a sweeping pronouncement of law, entirely independent of the facts of the case. Whether the right "discovered" by the Ninth Circuit actually exists is a question which can only be resolved by this Court. Further, the opinion is bedrocked on the erroneous conclusion that this Court has held that a witness has an unfettered right to consult with an attorney at any time during the course of his or her testimony before a grand jury. Because other circuits have reached this same, unfounded conclusion, this Court must act to clarify the issue.

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

This case comes to this Court following the Ninth Circuit's reversal of a summary judgment that was granted to the petitioners by the District Court. Necessarily then, the objective of the trial court, as well as the Court of Appeals and this Court, was *not* to resolve disputes of fact, but rather to evaluate of the *un*disputed facts in order to determine whether those facts were sufficient to entitle the petitioners to judgment as a matter of law. Consistent with the limited role that the facts are permitted to play in this type of proceeding, the petitioners, in their statement of the facts underlying this matter (set out at pages 4-7 of the Petition for Writ of Certiorari), attempted to present, in a reasonably neutral manner, only the facts that were not in dispute,

The respondent has taken a different tack. His presentation of the facts (in his Statement of Facts at pages 2-8 of the Respondent's Brief in Opposition to Petition for Writ of Certiorari) reflects exclusively the respondent's version of events, offered in a highly partisan manner. In essence, what he has provided to this Court is an argument to a jury, rather than a foundation of undisputed facts on which to evaluate the appropriateness of the petitioners' motion for summary judgment. Furthermore, respondent's statement of the facts is misleading, in the following respects:

1) Respondent asserts (on page 3 of the Brief in Opposition) that "each of the two courts below" determined that the petitioners, in engaging in the conduct at issue here, "were acting in their investigative capacities" rather than in their prosecutorial roles. This is misleading, because the actions that both courts described as investigatory were *not* the conduct that forms the basis of the cause of action created by the Ninth Circuit.

The District Court and the Court of Appeals were referring to the allegations that the petitioners served and/or were present at the service of search warrants, introduced the respondent to the special master that searched him, and were present during and/or participated in searches. (See Petition at pages A-10 and B-6.) *But* the Court of Appeals found that the basis for petitioners' liability under the Fourteenth Amendment was their supposed "undu[e] and unreasonabl[e] interfere[nce] with the [respondent's] right to practice his profession by preventing [him] from offering legal assistance to [his] client in the very matter and at the very moment for which [he] was retained." (Petition, page A-17.) The petitioners allegedly accomplished this by "executing the search warrant on Gabbert at almost the exact time Baker was being haled into the grand jury room. The plain and intended result was to prevent Gabbert from consulting with Baker during her grand jury appearance." (Petition, pages A-15 through A-16; footnotes omitted.)

In other words, the petitioners' alleged misconduct was *not* in the obtaining or service of search warrants, introducing the special master to the respondent, or being present at or participating in searches. Rather, it was in exercising their *prosecutorial* powers over *when* witnesses are called to testify before a grand jury. If the search of the respondent and his client's testimony before the grand jury had not happened to overlap, there would be no conceivable basis for a Fourteenth Amendment claim by the respondent. We are here *only* because the petitioners engaged in an action which they could *only* perform in their role as *prosecutors*, not investigators.

Thus, by simply stating that both lower courts found that the petitioners were acting in their investigative, rather than prosecutorial, roles, the respondent is completely ignoring the very legal rationale offered by the Ninth Circuit

itself in support of its decision to overturn the District Court's grant of summary judgment.

2) On page 5 of the Brief in Opposition, the respondent states that the special master "took Gabbert into a separate room." In fact, that was done because the respondent himself specifically requested that the search be conducted in a private room (2 ER 352; see Petition at page 5), making this an entirely *voluntary*, not coerced, action.

3) The respondent goes on at length about the improprieties allegedly committed by the special master during his search of the respondent. (Brief in Opposition, pages 5-6.) But this is completely irrelevant to the issues before this Court, which solely involve the actions of the two prosecutors, who had no control over the manner in which the special master conducted his search of the respondent.

4) The respondent spends even more time reciting the concerns and fears Traci Baker allegedly felt while the respondent was being searched. (Brief in Opposition, pages 6-8.) But Ms. Baker is not the plaintiff here. The impact, if any, that this incident may have had on her is entirely irrelevant to the claim that *her attorney's* rights were violated by the actions of the petitioners.

5) The respondent asserts that "Baker ... could not talk to her lawyer because he was still being searched." (Brief in Opposition, page 7.) That simply is not true. As was outlined in the Petition for Writ of Certiorari (at pages 5-6), the respondent was specifically offered an opportunity to consult with Ms. Baker as soon as she requested to do so. **He refused!** The respondent did not even ask the special master to suspend the search while he consulted with his client, much less have such a request denied.

REPLY TO RESPONDENT'S STATEMENT OF REASONS WHY THE PETITION SHOULD BE DENIED

Contrary to the respondent's contention (at page 9 of the Brief in Opposition) this case *does* implicate two of "the legal questions this court traditionally reviews." The first is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" (Rule 10(c)). Specifically, the Ninth Circuit erroneously concluded -- as have other Circuit Courts of Appeals -- that this Court has definitively ruled that "a witness has the right to consult with her attorney outside the grand jury room." (Petition, page A-13.)

The second reason certiorari should be granted here is that "a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Rule 10(c)). Specifically, the Ninth Circuit, contrary to several decisions of this Court, held that a cause of action for interference with the right to practice a profession can be stated for conduct that only "interferes" with a person's ability to practice his or her profession, rather than being limited to conduct that either entirely prevents a person from engaging in a specific aspect of his or her chosen profession or prevents that person from engaging in that profession in any manner at all.

A review of the specific arguments offered by the respondent as reasons why the petition for certiorari should be denied shows that they in fact provide no substantial grounds for this Court to refuse to review this matter.

1. THIS IS THE ONLY OCCASION ON WHICH REVIEW CAN BE CONDUCTED OF THE OPINION BELOW

The first ground offered by the respondent as to why this Court should deny the Petition for Writ of Certiorari is

his claim that to grant review would result in "[p]iecemeal appellate review" , because "whatever the disposition of the Petition for Writ of Certiorari, the Fourth Amendment claim [of respondent against petitioner David Conn] will still have to be resolved below." (Brief in Opposition, pages 10, 11.) But this argument ignores that the appellate review process has already begun here, and has resulted in a *published* opinion, which, unless reversed by this Court, is the law of the case and is *not* subject to any further review by either the District Court or the Ninth Circuit.

The Ninth Circuit's decision did not simply return the parties to the *status quo ante*. It constituted an explicit holding that the respondent had stated a prima facie case for violation of his Fourteenth Amendment right to practice his profession. Not only is the District Court precluded from revisiting that claim, but so is the Ninth Circuit under the law of the case doctrine. (See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-817 (1988) ; *Jeffries v. Wood*, 114 F.3d 1484, 1488-1489 (9th Cir. 1997).)

In other words, *this* decision of the Ninth Circuit is the last word on this subject. Any further proceedings in this matter, whether in the District Court or the Ninth Circuit, will have no effect on the rule laid down by the Ninth Circuit in this opinion. If that holding is to be reconsidered, it must be on the basis of a review of *this* opinion, and not some future decision that might be reached two or three years down the line on other aspects of the lawsuit.

The cases cited by respondent to support his assertion that "[p]iecemeal appellate review is clearly disfavored" (Brief in Opposition, page 10) deal with the question of whether any appeal at all should have been allowed at that point in the proceedings. But neither case implied that there is any sort of limitation on the ability of *this* Court to review matters already subjected to review by an appellate court.

This court's power of review is discretionary, and so it certainly has the option to review *published* appellate court decisions on important issues, particularly where the lower court's decision conflicts with existing Supreme Court precedents and addresses an important issue of law that has yet to be ruled upon by this Court. In short, neither "judicial economy" nor "orderly judicial administration" justifies denying this petition for writ of certiorari.

2. THE LEGAL PRINCIPLES SET OUT IN THE NINTH CIRCUIT'S OPINION ARE ENTIRELY NEW, AND ARE IN NO WAY "CLEARLY ESTABLISHED"

The second ground offered by respondent as to why this Court should deny the Petition for Writ of Certiorari is that "[t]he Constitutional right at issue here -- Gabbert's right to represent his client without arbitrary governmental interference -- is not novel or unique", and thus, "because no special, important, or even unsettled legal issues are implicated in this matter, the Court should not grant review." (Brief in Opposition, page 19.) This argument simply ignores the respondent's own contentions in this case and the rule of law announced by the Ninth Circuit in its opinion.

As the respondent recognizes (at page 15 of the Brief in Opposition), the essential underpinning of the Ninth Circuit's opinion is its conclusion that "the right of a client to consult with her attorney outside the grand jury room is clearly established." The only Supreme Court case cited in support of this proposition by either the respondent or the Ninth Circuit is *United States v. Mandujano,* 425 U.S. 564, 581 (1976). But as was shown in the Petition for Writ of Certiorari at page 17, the *Mandujano* court did *not* find such a right to exist, and a later opinion of this Court, *United States v. Williams,* 504 U.S. 36, 49 (1992), indicates that, to the contrary, this Court would most likely *deny* the existence

of such a right. Since, as both the respondent and the Ninth Circuit acknowledge, this interpretation of *Mandujano* is indispensable to the decision below, and given that other Circuit Courts of Appeal have similarly misread *Mandujano,* then under the rules of this Court review *should* be granted to definitively resolve this question.

The respondent asserts that the "case law also makes clear [that] the Constitutional right to engage in one's occupation necessarily incorporates the right to perform all aspects of one's profession, including its 'day-to-day' activities, according to the 'highest standards of the profession.'" (Brief in Opposition, page 13.) The case law says no such thing. As discussed at length in the Petition at pages 13-16, all of the relevant precedents from this Court indicate exactly the opposite. And the cases cited by the respondent deal with situations where professionals were *entirely* precluded from practicing a portion of their profession, not situations where their "day-to-day" activities were interfered with on a single occasion. E.g. *Nyberg v. City of Virginia,* 495 F.2d 1342, 1344 (8th Cir. 1974) (physicians prevented from performing *any* elective abortions at municipal hospital); and *Young Women's Christian Association v. Kugler,* 342 F.Supp. 1048, 1066 (D.N.J. 1972) (physicians had standing to challenge New Jersey's criminal abortion laws). This was also the case in *Meyer v. State of Nebraska,* 262 U.S. 390, 400-401 (1923) (on which the petitioners did *not* "heavily rely"), where the State of Nebraska *entirely* forbid teachers from engaging in certain activities. (See Petition, page 15.) The facts underlying the present case are altogether different.

The respondent goes on at length about the impact the petitioners' alleged misconduct had on the respondent's *client* (Brief in Opposition, pages 6-8, 16-19), and cites numerous cases about the importance of consultation between a lawyer and a client. But all of this goes to the rights of the *client*

to full and appropriate legal representation, *not* to the rights of the attorney to practice his or her profession. These are the cases that have language most similar to that utilized by the Ninth Circuit in the opinion below, but in each of these cases, the attorneys involved were simply acting to preserve their *clients'* right access to legal representation, *not* to vindicate their own rights. E.g. *Keker v. Procunier,* 398 F.Supp. 756, 761-763 (E.D. Cal. 1975) (challenging prison conditions that impacted the ability of inmates to have access to their lawyers; *Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation,* 507 F.2d 1281, 1284 (8th Cir. 1974) (challenging FBI actions that impacted the ability of clients to receive legal assistance from their lawyers; see also *In re Grand Jury Proceedings, Des Moines, Iowa,* 568 F.2d 555, 556 (8th Cir. 1977)); *Steinke v. Washington County,* 857 F.Supp. 55, 56 (D. Oregon 1994) (attorneys' demand for injunction requiring "adequate and private space" to confer with their clients at the County Jail).

Even the cases the respondent cites for the proposition that an attoney has "the duty, and right, to consult with his client" (Brief in Opposition, page 14) -- *United States v. Tucker,* 716 F.2d 576, 581 (9th Cir. 1983); *Coles v. Peyton,* 389 F.2d 224, 225-226 (4th Cir. 1968); *Adams v. Balkcom,* 688 F.2d 734, 738 (11th Cir. 1982); and *United States v. Porterfield,* 624 F.2d 122, 124 (10th Cir. 1980) -- focused on the rights of the clients, not the attorneys, in that *each* involved a claim by a criminal defendant of ineffective assistance of counsel, not a claim made by an attorney on his own behalf.

There simply are *no* cases that support the entirely new cause of action crafted by the Ninth Circuit, and, as discussed in the Petition for Writ of Certiorari, there *are* several decisions from this Court that indicates that no such cause of action can be derived from the Constitution.

3. THE DECISION BELOW IS NOT FACT-SPECIFIC, AND MAKES A BROAD CHANGE IN THE LAW

The third ground offered by the respondent as to why this Court should deny the Petition for Writ of Certiorari is that "this case involves extraordinary facts" and therefore "the appellate court's holding involved a limited application of established law to unique facts." (Brief in Opposition, page 20.) As discussed in Section 2 above, the Ninth Circuit was *not* applying established law, but rather was creating entirely new law. Further, the Ninth Circuit went out of its way to make broad statements of law. The opinion is decidedly *not* fact-specific.

But respondent's heavy emphasis on the supposedly "extraordinary facts" underlying this case (which are extraordinary only if you accept without question the respondent's version of events, including his guesses as to the motivations of the petitioners*) does point out another way in which the Ninth Circuit's opinion is a drastic departure from all prior cases even remotely like this.

The respondent attempts to minimize the potential for other lawsuits based on the Ninth Circuit's holding below by arguing that "[u]nlike Petitioners' 'bus scenario,' the *government* in this case *deliberately interfered* with an attorney's representation of his client. It is this **intended** interference with a clearly established right that frames the basis of the claim here." (Brief in Opposition, page 18, fn.4;

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* Contary to the assertions of both the Ninth Circuit (Petition, page A-16, fn.4) and the respondent (Brief in Opposition, page 16, fn.3), the tape recording of the oral argument reveals that counsel for the petitioners did *not* concede at oral argument "that the timing of the search was designed to prevent Gabbert from consulting with Baker", as was pointed out to the Ninth Circuit in the Petition for Rehearing (at page 13, fn.3).

italics in original, other emphasis added.) But even the Ninth Circuit itself acknowledged that the standard is *supposed* to be "whether the officials' actions were *objectively* reasonable under the facts and circumstances, *without regard* to their underlying intent or motivation." (Petition, page A-14; emphasis added.)

Case law in this area is beyond merely being "clearly established". The issue in these cases is simply "Did the officials' actions comply with constitutional requirements?" Good intentions will not excuse a constitutional violation, but mere bad intentions cannot create such a violation. Here, however, the respondent is explicitly arguing that what is at issue here is not *what* the petitioners did, but rather *why* they did it. If that is the case, then the Ninth Circuit has just rejected decades of civil rights case law. If that is not what the Ninth Circuit's had in mind (and its opinion indicates that it was not [Petition, page A-14]), then, as discussed more fully in the Petition at pages 20-23, the Court of Appeals has set an impossible-to-meet standard for public officials. That standard should not be allowed to stand, at least not in its present impossibly high formulation.

CONCLUSION

For all these reasons, the petitioners urge the Court to grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: September _____, 1998

Respectfully submitted,

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